IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.817 OF 1992

Sanjiv Madhavrao Chavan ..Appellant

V/s.

1. Shaikh Bismulla Rahemtulla ..Respondents
2. Mohmed S/o.Jubai Ibrahim
3. The Oriental Fire & General Insurance Co.

Mr.R.M.Haridas i/b. P.N.Joshi, advocate for the Appellant
Mrs.Anita Agrawal, advocate for the respondent No.3

CORAM : A.S.OKA, J.

DATE : JANUARY 19, 2007

ORAL JUDGMENT

1. Heard the Advocates appearing for the parties. The Appellant-the original Claimant has taken an exception to Judgment and Award dated 30th July, 1988 passed by the learned Joint District Judge and Member of Motor Accident Claims Tribunal at Nasik. By the impugned Judgment and Award, the claim petition filed by the Appellant was partly allowed.

2. According to the case of the Claimant, on 12th August, 1985 at about 4.30 p.m he was driving his Motor Cycle from Nasik to Chandwad via Bombay Agra road. At the distance of one furlong from Ozar town, a Taxi owned by the first Respondent came from the opposite direction and there was a collision between the aforesaid Motor Cycle and the Taxi. As a result of the accident, the Appellant suffered bodily injuries. At the relevant time, the second Respondent was driving the Taxi. The Taxi was validly insured with the third Respondent. The claim of the Appellant was in the sum of Rs.68,052/-.

3. The claim was contested by the first Respondent by contending that the Appellant himself was driving the Motor Cycle in a rash and negligent manner under the influence of liquor. It is alleged that he was driving the Motor Cycle in a zigzag manner. The third Respondent filed Written Statement by contending that on the date of the accident, the second Respondent did not possesses a licence to drive the Taxi and therefore, the

Company was not liable to honour the Award which may be passed against the Insurer on account of the breach of the terms and conditions of the policy. The learned Member of the Tribunal held that the Appellant was entitled to compensation of Rs.25,559/-. He held that the driver of the Taxi was negligent. However, the learned Member held that even the Appellant has contributed to the accident to some extent. He, therefore, deducted 20% of the compensation amount. The Tribunal held that the third Respondent insurance company was not liable to pay the compensation.

4. Mr.R.M.Haridas, learned advocate for the Appellant has taken me through the notes of evidence and other material on record. He submitted that the Tribunal has not found the Appellant to be negligent and in fact, the finding is that the driver of the Taxi was negligent. He submitted that there was no reason for making a deduction of 20%. He pointed out that while granting compensation on account of loss of income, Travelling Allowance in the sum of Rs.200/- p.m. is

not taken into consideration by the learned trial judge. He submitted that only a small amount is granted on account of pain and sufferings. Mrs.Anita Agrawal, learned advocate appearing for the third Respondent has placed reliance on the decision of **NATIONAL INSURANCE COMPANY LIMITED V/s. KUSUM RAI (2006)4 Supreme Court Cases 250**. She submitted that admittedly, the driver of the Taxi was not possessing a licence to drive the Taxi on the date of the accident and therefore, the learned trial Judge has rightly exonerated the third Respondent.

5. I have considered the submissions. It will be necessary to firstly deal with the submissions regarding negligence. The Appellant deposed before the Tribunal that he was travelling via Bombay Agra road from Nasik to Chandwad by his Motor Cycle. According to him, his speed was about 40 Km per hour. Near the town of Ozar, there is a long turn on the road. According to him, the Taxi owned by the first Respondent came from the opposite direction in excessive speed. He saw the Taxi

coming on its wrong side and therefore, he tried to take his Motor Cycle to the centre of the road to avoid the accident. He stated that the driver of the Taxi after realising that his taxi had come on the wrong side tried to correct himself and attempted to take the Taxi on his left side. As a result, the Taxi gave him a dash and he was thrown out and he became unconscious. In the cross examination, a suggestion was given to him that he had consumed Alcochol and therefore, he was not in a position to control his Motor Cycle. The said suggestion was denied by him. He admitted that he reduced the speed of the Motor Cycle after noticing the Taxi but he did not apply brakes. He denied correctness of the suggestion that the accident took place on the left side of the kachha road as one faces Nasik side. He admitted that the point of impact was on the left side bumper of the Taxi.

6. The second Respondent examined himself. His case is that the Appellant was riding his Motor Cycle in a zig-zag manner. He stated that after noticing the Motor Cycle he took his Taxi to the

extreme left side of the road and stopped it partly on kachha road and partly on pakka road. He stated that the Motor Cyclist came on his wrong side and dashed on the left hand side of the front bumper of the Taxi. He admitted that on the date of the accident,he was authorized to drive three wheelers, heavy goods vehicle, medium goods vehicle and light motor vehicles. He was not authorized to drive the Taxi. He admitted that an endorsement for driving a taxi on the licence was obtained by him after the accident on 25th November, 1985. In the cross examination he further admited that he left the Taxi at the spot of the accident till the police made panchanama of that spot. He admitted that when his statement was recorded by the police on the date of the accident, it is not recorded by the police in his statement that the Motor Cycle was being driven in a zigzag manner.

7. Thus, the case made out by the Appellant is that he noticed that the Taxi came on its wrong side while negotiating the long turn. His case is that he was driving his Motor Cycle by the left

side of the road and after noticing the Taxi coming on its wrong side, he tried to take the Motor Cycle on its right side to the centre of the road with the hope of avoiding the accident. He stated that taking the Motor Cycle on rough road on its extreme left side was found by him to be very risky. The attempt made by the second Respondent is to state that the accident took place when he took his taxi to the extreme left side and in fact at the point of impact the Taxi was standing partly on kachha (rough) road and partly on asphalted road. According to the Appellant, the point of impact was at the centre of the road and the case of the Respondent No.2 is that his Taxi was on its extreme left side at the point of impact. It will be, therefore, necessary to read the spot panchanama at Exh.52 which is admitted in evidence by the consent of the parties. The spot panchanama records that the Taxi was standing right at the centre of the road and all its wheels were on the main road and not on the kachha road. The second Respondent has admitted in the cross examination that he kept his Taxi at the spot of the accident till the

panchanama was drawn. Thus, the panchanama completely falsifies case of the second Respondent that he had taken the Taxi on its extreme left side and stopped the Taxi at that point and it was the Appellant who came on his extreme right hand side and dashed against the Taxi. The fact that the Taxi was standing right at the centre of the road completely supports the case made out by the Appellant. In his examination-in-chief the second Respondent admitted that his statement was recorded by the police on the very day of the accident. On that day in the statement, the second Respondent has not stated that the Appellant was driving his Motor Cycle in a zigzag manner. The learned trial Judge in paragraph 9 of the Judgment has accepted the explanation given by the Appellant for not taking his Motor Cycle on the kachha road on the left hand side. Thus, it is not possible to accept the finding of the learned Member of the Tribunal that the Appellant has contributed to the accident to the extent of 20%. The said finding is completely contrary to the oral and documentary evidence on record and therefore, there was no

justification in making deduction of 20% from the compensation amount.

8. In so far as quantum is concerned, the Appellant has stated in his evidence that initially he was admitted to the Civil Hospital at Nasik. The Certificate at Exh.58 issued by Dr.Savkar shows that he had a fracture below left knee. Plaster was put on his left leg in the Civil Hospital. The plaster was removed after three months. The Appellant faced difficulty and therefore, he approached Dr.Savkar on the same day. Dr.Savkar is an Orthopaedic Surgeon practising at Nasik. He immediately operated upon the Appellant on his left leg and steel plates were fixed on the fractured bone. He was hospitalised for ten days and thereafter, his left leg remained under plaster for three months. In paragraph 4 of his deposition, the Appellant has stated that after he resumed duties he found that the skin of his left leg was torn to the extent of three inches. The doctor advised him rest for one month and steel plate inserted was removed and till he recovered, he was

asked to do the table work. The Certificate issued by Dr.Savkar at Exh.58 shows that he had total temporary disability for a period of nine months. Considering all these aspects, the compensation awarded by the trial Court on the ground of mental agony, pain and sufferings of Rs.10,000/- is on the lower side. A sum of of Rs.15,000/- ought to have been awarded on the said count. So far as travelling allowance is concerned, the trial Court has denied compensation on the said count. Travelling allowance was payable to the Appellant for meeting the travelling charges incurred for travelling upto the place of employment and return from the place of employment. For a period of six months, the Appellant was required to take leave without pay. Compensation has been granted to him equivalent to the loss of actual pay. Therefore, no error can be found in the approach of the Tribunal when he did not grant compensation on account of the travelling allowance. The compensation granted on other counts appear to be correct. Thus enhancement of Rs.5000/- will have to granted on account of pain and suffering. Thus,

total compensation payable to the Appellant is Rs.30,559/-.

9. The other question is regarding liability of the Insurance Company. It will be necessary to refer to the decision of the Apex Court in the case of **NATIONAL INSURANCE COMPANY LIMITED Versus SWARAN SINGH AND OTHERS reported in (2004)3 Supreme Court Cases 297**. The Apex Court dealt with the scope of defence available to the Insurance Company. The conclusions of the Apex Court are summarised in paragraph 110. Clauses 3 to 7 of paragraphs 110 are relevant which read thus :-

> (iii) The breach of policy condition e.g.disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly

licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The Court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

10. In the present case the owner of the Taxi also stepped into witness box. The owner has been

cross examined by the advocate appearing for the Insurance Company. Surprisingly, no cross examination has been made on the aspect of the negligence of the owner in ensuring the performance of terms and conditions of the policy of insurance. Not even a suggestion is given that the owner was negligent in allowing the second Respondent to drive the Taxi though he was not possessing a licence to drive the Taxi on the date of the accident. The Apex Court has held that the burden to prove that the insured was guilty of negligence and has failed to exercise due deligence in the matter of fulfilling the conditions of policy regarding use of vehicle by a duly licensed driver is on the Insurer. The Apex Court held that whether said burden is discharged or not depends on facts and circumstances of each case. In the present case, no suggestion was given to the second Respondent in his cross examination that he had made aware the first Respondent about the fact that necessary endorsement for driving the Taxi was not made on his licence. No suggestion is given either to the first or second Respondent that the first

Respondent was aware about this fact. In this case both the owner and driver were very much available for cross examination of this aspect. Therefore, considering the peculiar facts of the case it is not possible to record a finding that the Insurance Company discharged its burden.

11. In clause (vi) of paragraph 110 of the said decision, the Apex Court has held that it is not enough for an insurer to prove the breach of terms and conditions of the policy but to avoid liability it must be established that the breachs on the part of insured of condition regarding holding a valid driving licecse are so fundamental as are found to have contributed to the cause of the accident. In the present case it is an admitted position that the date on which the accident occurred, the second Respondent was authorized to drive three wheelers, heavy goods vehicle, medium goods vehicle and a light motor vehicle. Looking to the evidence and cross examination of the owner and driver of the vehicle, it cannot be said that the breach was so fundamental that it has contributed to the cause of

the accident. The driver was very much conversant with the driving and was authorized to drive practically all kinds of vehicles except a Taxi. If the car involved in the accident was not converted into a taxi, the second Respondent was competent and authorized to drive the same on the date of the accident. It will be necessary to refer the case reported in **NATIONAL INSURANCE COMPANY LIMITED Versus KUSUM RAI (Supra)**. In the facts of the case before the Apex Court, it was found that the driver of the vehicle on the relevant day was not possessing any licence to drive a commercial vehicle. In the facts of the said case it was found that the owner of the vehicle cannot contend that he had no liability to verify the fact that the driver of the vehicle possessed a valid licence or not. Thus, in the facts of the case before the Apex Court, the driver did not possesses the licence to drive a commercial vehicle whereas in the present case the driver was authorized to drive even a heavy goods vehicle apart from medium goods vehicle and a light motor vehicle. The perusal of the decision of the Apex

Court in the case of **NATIONAL INSURANCE COMPANY LIMITED Versus KUSUM RAI** shows that the Apex Court has not taken a view which is different from the conclusions drawn in its earlier Judgment in the case of Swarn Singh (Supra). In this view of the matter, it cannot be said that the breach was so fundamental that it contributed to the cause of the accident. Thus, the finding of the trial Court that the third Respondent was not liable will have to be set aside. Hence, the Appeal must succeed and the Appeal is accordingly partly allowed by passing the following order.

O R D E R

I. The operative part of the impugned Judgment and the Award is substituted by the following.

"The Claimant do recover jointly and severally from Opponent Nos.1 to 3 a sum of Rs.30,559/- with proportionate costs, and interest on a sum of Rs.10,448/- at the rate of 12% p.a. from 10th February, 1986 till the date of the payment and further interest at the rate of 7.5% p.a. on the sum of Rs.30,559/- from the date of the Award i.e.30th July, 1988 till realisation.

The Award be drawn up accordingly."

II. The Appellant will be entitled to

proportionate costs of this Appeal from the Respondent Nos.1 and 3.

III. It is clarified that if the Respondent No.1 has paid any amount to the Appellant in compliance with the impugned Judgment and the Award, liability of the third Respondent will be only to the extent of the balance amount payable under the modified Award.

IV. Writ be sent immediately.

(A.S.OKA, J.)